

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 01-150256

Employee: Delores Mills
Employer: St. Johns Mercy Health Care (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 18, 2008. The award and decision of Administrative Law Judge Suzette Carlisle, issued December 18, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 3rd day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Delores Mills	Injury No.: 01-150256
Dependents:	N/A	Before the
Employer:	St. Johns Mercy Health Care (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured	Department of Labor and Industrial
Hearing Date:	September 22, 2008	Relations of Missouri
		Jefferson City, Missouri
		Checked by: SC:JO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
 - Date of accident or onset of occupational disease: December 12, 2001
 - State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 - Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant injured her right Achilles tendon when she stepped onto soft, wet ground.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right ankle
 - Nature and extent of any permanent disability: 22.5% PPD at the 155 week level

15. Compensation paid to-date for temporary disability: \$30,709.96
16. Value necessary medical aid paid to date by employer/insurer? \$30,761.86

Employee: Delores Mills

Injury No.:01-150256

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: \$628.90

19. Weekly compensation rate: \$329.42
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

22. Second Injury Fund liability: Yes

45.4 weeks of permanent partial disability from the Second Injury Fund \$14,955.67

Total: \$14,955.67

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John Adams

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Delores Mills

Injury No.: 01-150256

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: St. Johns Mercy Health Care (Settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Self-Insured

Checked by:SC:JO

STATEMENT OF THE CASE

A hearing for a final award was held at the Missouri Division of Workers' Compensation ("DWC") St. Louis office at the request of Delores Mills, ("Claimant"), on September 22, 2008, pursuant to Section 287.450 RSMo (2000). Attorney John Adams represented Claimant. Attorneys James Huss and Eileen Krispin represented the Second Injury Fund ("SIF"). The record closed after presentation of evidence. Venue is correct and jurisdiction properly lies with DWC.

Prior to hearing, St. John's Mercy Health Care ("Employer"), self-insured, settled the primary case with Claimant for 19 ½ % of the right ankle.

Claimant's Exhibits A-B and E-R were admitted without objection. Exhibit C was withdrawn but retained and Exhibit D was withdrawn and removed. SIF offered no exhibits. Any notations contained in the records were present when admitted. Any objections contained in the depositions but not expressly ruled on in the award are overruled.

STIPULATIONS

The parties stipulate that on or about December 12, 2001:

- Claimant sustained an accident in St. Louis County; Missouri;
- The accident arose out of and in the course of Claimant's employment;
- Claimant and Employer operated under the Missouri Workers' Compensation Law;
- Employer's liability was self-insured;
- Employer had notice of the injury;
- A Claim for Compensation was timely filed;
- Claimant's average weekly wage is \$628.90;
- Claimant's rate of compensation is \$329.42 for Permanent Partial Disability("PPD");
- Employer paid TTD totaling \$30,709.96 for 48 7/8 weeks, from 12/12/01 to 6/4/03;
- Employer paid \$30,761.86 in medical benefits;
- Claimant reached maximum medical improvement ("MMI") on 6/4/03; and
- The Court takes judicial notice of the Stipulation for Compromise Settlement (Exhibit C) between Claimant and Employer and that SIF was not a party to the agreement.

ISSUES

The issues to be resolved are:

- What is the nature and extent, if any, of SIF liability for PPD?
- What is the nature and extent, if any, of SIF liability for PTD?

SUMMARY OF DECISION

Claimant met her burden to show SIF liability for PPD benefits based on the entire record, including expert testimony, Claimant's testimony, demeanor, medical reports, and the applicable law of the State of Missouri.

FINDINGS OF FACT

All evidence was reviewed, but only evidence supporting this award is considered to establish the following facts. Based upon competent and substantial evidence presented at hearing, I find the following facts:

Background facts

- On December 12, 2001, Claimant was a 56 year old high school graduate. Post-high school education included real estate training with an expired license; H&R Block tax course training, but no employment as a tax preparer; and employer sponsored classes. Claimant has been married forty-four years.
- From 1980 to 1990 Claimant worked from home and maintained accounting records for her spouse's business. Claimant worked a number of years as a claims processor; handling dental and psychiatric claims. Later, she managed physician clinics for Lincoln County Medical Center.

Primary Injury

- Employer hired Claimant in early December 2001 as a physician services consultant. While leaving the parking lot on December 12, 2001, Claimant stepped onto soft, wet gravel and her right foot sank into the ground above the ankle. Her foot was injured when she worked it free from the dirt. After Claimant's foot was free, she retrieved her shoe.
- Claimant's ankle was surgically repaired three times. She was released from medical care in June 2003 but did not believe she could return to her previous work.
- A short time later, Claimant worked from home as a claims processor for several weeks. However, she could not maintain required quotas and quality because she needed breaks to rest her eye and back. If she sat too long, pain radiated from her back to hips, legs, and knees. Periodically, Claimant walked to prevent pain. She has not worked since 2003.
- Ankle complaints include numbness on one side, minor pain, and discomfort wearing a shoe with a strap or back. Claimant takes no medication for the right ankle.

Primary injury medical facts

- On December 12, 2001, **Unity Corporate Health** diagnosed a ruptured right Achilles tendon and referred her to an orthopedic doctor.
- On December 31, 2001, **Dr. David Andersen**, an orthopedic physician, examined Claimant and surgically repaired the tendon on January 2, 2002.
- On January 8, 2002, Claimant slipped at home and felt pain in her right heel. On January 28, 2002, **Dr. James Burke** and **Dr. Vilray Blair III** examined Claimant and diagnosed recurrent Achilles tendon rupture. Dr. Vilray Blair III repaired the failed tendon repair on January 29, 2002. Dr. Blair ordered

physical therapy and referred Claimant to **Dr.** to heal.

Bruce Kraemer in December 2002, after the injury failed

- On February 27, 2002, Dr. Kraemer removed a ruptured suture. Claimant developed a right heel ulcer. On March 13, 2003, Dr. Kramer surgically removed the sutures. He released Claimant from care on June 25, 2003.

Pre-existing Medical Facts

A. Right eye

- In 1983, Claimant developed a cancerous tumor of the right eye. About 1987, she lost vision and the eye was removed due to a glaucoma induced cataract. She developed problems with depth perception. The prosthetic eye irritates the socket. Radiation treatment blocked tear-ducts. Vision is blurred with prolonged computer work and insufficient breaks. Headaches impaired ability to work. When Claimant worked from home, she took medication and rested as needed. The prosthetic eye caused problems processing claims, but Claimant achieved production quotas.

B. Bilateral knees

- Claimant developed bilateral knee pain when walking, sitting or standing. In 1997, Claimant injured her right knee getting into a car and received surgery to repair a meniscal tear. The repair helped for a short time. In 1998 and 1999, Claimant received cortisone injections in both knees for symptoms related to degenerative changes.
- Claimant received additional bilateral knee injections in April 2000 and June, July and August 2001. Claimant experienced 10/10 pain in both knees, but prior to 2001 no surgery was performed on the left knee.
- Before December 2001, MRI results showed right knee degenerative joint disease, spurring, and left knee degenerative changes and a complex tear of the posterior horn of the medial meniscus. After conservative treatment failed, Dr. Ted Rummel repaired the right medial meniscus on October 29, 2001.
- On December 21, 2001, **Dr. Joseph Williams** examined Claimant. X-rays revealed severe osteophyte formation, narrowed medial joint space and subchondral sclerosis of the femur and tibia. Dr. Williams diagnosed bilateral degenerative joint disease and injected both knees. He injected both knees again in April, June, and September of 2002.
- After the work accident in 2001, Claimant's knee problems increased, resulting in a left knee replacement in 2006, and three recommendations for a right knee replacement.

C. Thoracic and lumbar spine

- In the early 1990's, Claimant received physical therapy for low back problems. Later, a neurologist "decompressed" her spine with stretching. In 1994, an MRI revealed a L5-S1 disc protrusion. Claimant received at least sixteen injections between 1995 and 2001. She missed work for therapy, treatments, and because of an inability to sit. Pain radiated from her back to one of her lower legs with prolonged sitting. Medication included Vicodin and hydrocodone.
- In 1997, Claimant injured her neck and upper back in an automobile accident and received chiropractic treatment. She started taking Ambien because pain in her back and knees caused sleep problems.
- A January 2000 MRI revealed disc bulges at T11-T12 and T12-L1, diffuse desiccation at three lower disc levels, narrowing at L5-S1, and hemangioma of the L4 vertebral body. X-rays revealed severe degenerative arthritis of the lumbar spine, extensive at L4-5 and L5-S1, stenosis, and anterolateral stenosis at L4-5.
- Claimant received numerous injections to the upper and lower back between 1998 and September 2001. In 1998, Wellbutrin was prescribed for depression caused by limitations due to back and knee pain. Complaints included stiffness, and problems sitting or standing for long periods.
- By 1998, Claimant stopped riding a motorcycle and horses, and could not carry her new grandchild due to bilateral knee and back problems. Claimant's spouse provided more assistance with housework and they ate more convenience foods.
- Claimant takes medication for arthritis, high blood pressure, sleep, thyroid, allergies, and depression. Claimant received pain management and injections for her back through 2005. Injections no longer help; and pain is managed with medication and activity.
- Claimant uses a towel bar for support in the shower. She has left knee pain and right knee instability. Knee and back pain cause problems sleeping. She walks to relieve tension. Claimant stumbles when walking on uneven or unfamiliar ground due to loss of proprioception. Claimant needs periodic breaks for her back, knee, and eye.

Expert opinion

- On November 17, 2005, **Dr. Robert Poetz, D.O.**, an osteopathic surgeon, performed an independent medical examination ("IME") at the request of Claimant's attorney.

- Dr. Poetz found Claimant PTD due to a combination of the primary injury and pre-existing medical conditions.
- Dr. Poetz rated 45% PPD of the right ankle, 40% PPD of the right knee, 25% PPD of the left knee, 35% PPD of the body as a whole for the thoracic spine, 20% PPD of the body as a whole for the lumbar spine, and 60% PPD of the body as a whole for the left eye.
- Dr. Poetz found the combination of Claimant's primary and prior disabilities exceed their simple sum by twenty to twenty-five percent.
- Dr. Poetz imposed the following restrictions; avoid heavy lifting and strenuous activity, prolonged sitting, standing, walking, stooping, bending, twisting or climbing, and "activities that exacerbate symptoms or progress the disease process." He recommended she continue receiving spinal injections.
- Dr. Poetz opined Claimant would require bilateral total knee arthroplasty.
- On October 13, 2006, **Mr. James England Jr.**, a rehabilitation counselor, interviewed Claimant and found Claimant unable to work due to a combination of problems related to her knees, vision, and back. Mr. England included Claimant's 2006 knee replacement in his assessment, and noted difficulty sitting and standing for prolonged periods.
- Mr. England found Claimant possessed transferable skills to a light level of exertion, and possibly a sedentary level. Academics did not hinder Claimant's ability to learn a new job and supervisory experience increased her marketability. However, Mr. England concluded physical impairments prevented transfer of these skills to a new job.

RULINGS OF LAW

Claimant asserts SIF liability for PTD benefits. SIF denies liability based on subsequent deterioration of pre-existing conditions. Claimant has the burden to prove by a preponderance of credible evidence all material elements of her claim, including SIF liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). Claimant must prove the nature and extent of disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995). (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)).

Employer liability

In deciding whether [SIF] has any liability, the first determination is the degree of disability from the last injury considered alone. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App.2000). Pre-existing disabilities are irrelevant until the employer's liability...is determined. *Id.* If the last injury in and of itself rendered Claimant permanently and totally disabled, [SIF] has no liability and Employer is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.* 107 S.W.3d 240, 248(Mo banc

2003).
(Overruled by **Hampton**, 121 S.W. 3d at 220).

I find Employer liable for PPD benefits. Three surgeries were performed over an eighteen month period. Claimant's testimony is credible that it is uncomfortable to wear shoes with a back or strap. Numbness remains on one side. Dr. Poetz's opinion is credible that he observed swelling, and irregularity of the ankle. Dr. Poetz rated 45% PPD of the right ankle. I find SIF is not bound by the settlement between Claimant and Employer totaling 19.5% of the right ankle. **Totten v. Treasurer of State**, 116 S.W.3d 624, 628 (Mo.App. 2003). Based on credible testimony by Claimant and Dr. Poetz, medical records, and reports, I find Claimant sustained 22.5% PPD of the right ankle as a result of the December 2001 work accident.

SIF liability for PTD

To prove permanent total disability, claimant must show she is unable to return to any employment, not just unable to return to the employment she was engaged in when the injury occurred. **Muller v. Treasurer of Missouri**, 87 S.W.3d 36 (Mo.App. 2002). (Overruled by **Hampton**, 121 S.W. 3d at 220). The test is the claimant's ability to compete in the open labor market. **Id.** The "crucial question is whether or not an employer can reasonably be expected to hire claimant in her present physical condition and can reasonably expect her to perform the work successfully." **Id.** However, SIF is not responsible for the progression of pre-existing conditions that develop after the work injury. **Wilhite v. Hurd**, 411 S.W.2d 72, 77 (Mo. App. 1967). (Overruled by **Hampton**, 121 S.W. 3d at 220).

I find Dr. Poetz's opinion not credible that Claimant is PTD due to a combination of the primary injury and pre-existing conditions. Before the work accident, Claimant received numerous injections, physical therapy and medication for back and bilateral knee problems. However, no physician imposed work restrictions for these conditions. Also, there was no recommendation for knee replacements. After the work accident, Dr. Poetz imposed restrictions based on pre-existing back and knee problems, and the need to avoid activity that "accelerates the disease process."

Furthermore, Claimant testified she failed to meet quotas when she returned to work because she needed frequent breaks to avoid eyestrain and radiating pain from her low back to her hips, legs, and knees. The record contains no evidence Claimant was unable to work because of the Achilles tendon injury.

Claimant gave contradictory testimony about the condition of her knees after the work accident. She testified her knees felt worse at times, but overall remained the same. She also testified the left knee is painful, the right is unstable, and she stumbles on uneven ground. This is a change in the level and type of symptoms reported before 2001.

In 2005, Claimant stopped receiving injections because they no longer helped, and Dr. Poetz predicted Claimant would require bilateral arthroplasties. Her left knee was replaced a year later and three doctors have recommended a right knee replacement. In addition, Claimant takes medication for her knees and back but not the Achilles tendon.

I find Mr. England's testimony not credible that Claimant is PTD due to the primary injury and pre-existing conditions. Mr. England considered the left knee replacement and the recommended right knee replacement when concluded Claimant was PTD. However, the left knee was replaced five years after the work accident and the right knee had not been replaced by the date of hearing.

In addition, Mr. England concluded Claimant's academic and management skills were transferable to light or possibly sedentary work; if she did not have physical limitations. However, Claimant testified she stopped working because of back and knee pain, and eye strain.

Based on Claimant's testimony, expert opinions from Dr. Poetz and Mr. England, medical reports and medical records, I find Claimant's pre-existing back and knee conditions progressed after the work accident. I find SIF is not liable for the progression of the degenerative conditions. I find Claimant failed to prove PTD based on the primary

injury and pre-existing disability.

SIF Liability for PPD

Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. ***Leutzinger v. Treasurer of the State of Missouri***, 895 S.W.2d 591, 593 (Mo. App. 1995). Section 287.220.1 RSMo., provides SIF liability is triggered in all cases of PPD where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the preexisting disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and the preexisting conditions must produce additional disability greater than the last injury standing alone.

I find SIF liable for PPD benefits. I find Dr. Poetz's opinion credible that the Achilles tendon injury combined with the right eye, low back, and bilateral knee conditions to create a synergistic effect. After Claimant lost vision in her right eye, she lost depth perception, ability to shed tears, developed headaches, and the socket became irritated. When she worked from home, she took breaks and medication as needed. As a claims processor, she had difficulty at work, but could perform her duties. I find loss of vision created a hindrance or obstacle to employment. I find Claimant sustained 110% PPD of the right eye, which pre-existed the December 2001 accident.

Claimant received numerous low back injections. Diagnostics revealed severe degenerative changes prior to the work accident. Claimant missed work for physical therapy and inability to sit for long periods. Pain radiated from her back to her hips and legs. Claimant took prescription medication for pain. I find Claimant's low back condition created a hindrance or obstacle to employment. I find Claimant sustained 12.5% PPD of the whole body for the low back, which pre-existed the December 2001 work accident.

Claimant developed severe degenerative changes of both knees and received numerous injections. The right knee was surgically repaired twice. Claimant missed work and complained of pain when sitting too long. During the hearing, I observed Claimant shift in the chair and request a recess after direct examination to stretch her knees and back. I find Claimant's bilateral knees created a hindrance or obstacle to employment or reemployment. I find Claimant sustained 25% PPD of the right knee and 15% PPD of the left knee, which pre-existed the December 2001 work accident.

I find a synergistic impact between Claimant's primary injury and pre-existing medical conditions, and a 15% loading factor is applied. I find SIF liable for 45.4 weeks of PPD benefits.

CONCLUSION

SIF is liable for permanent partial disability benefits. The award is subject to a 25% lien in favor of Claimant's attorney for legal services rendered.

Date: _____

Made by: _____

Suzette Carlisle

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker

Director

Division of Workers' Compensation

Claimant's primary physician prescribes Wellbutrin, but she is not treated by a psychiatrist.